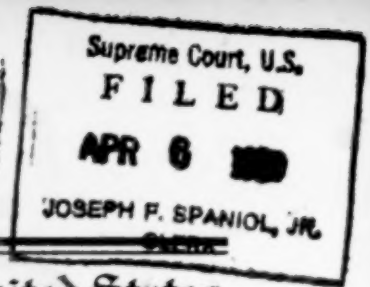


No. 89-1255



In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE,
INC., AND THE HEALTH AND PERSONAL CARE
DISTRIBUTION CONFERENCE, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT
NATIONAL FREIGHT CLAIM & SECURITY COUNCIL

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QUESTION PRESENTED

The Interstate Commerce Act provides that a motor common carrier may limit its liability for injury to or loss of a shipper's property "to a value established * * * by written agreement between the carrier * * * and shipper if that value would be reasonable under the circumstances surrounding the transportation." 49 U.S.C. § 10730(b)(1). The question presented is whether the Interstate Commerce Commission engaged in a "permissible construction of the statute" (*Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984)) in determining that a bill of lading, together with a filed tariff that fixes a limited value for goods shipped under that tariff, may in some circumstances constitute a written agreement establishing a limited value within the meaning of Section 10730(b)(1).



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**BRIEF IN OPPOSITION FOR RESPONDENT
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 887 F.2d 443. The opinion of the Interstate Commerce Commission (Pet. App. B1-B9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1989, and a petition for rehearing was denied on November 6, 1989. The petition for a writ of certiorari was filed on February 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Statutory Background

A motor common carrier¹ may “establish rates for the transportation of property * * * under which the liability of the carrier * * * for [loss or injury to] such property is limited to a value established by written declaration of the shipper or by written agreement between the carrier * * * and shipper if that value would be reasonable under the circumstances surrounding the transportation.” 49 U.S.C. § 10730 (b)(1). The carrier is fully liable for loss or injury to the transported property in the absence of such an arrangement with the shipper. 49 U.S.C. § 11707(a), (c).

A carrier's rates reflect the extent of its liability for loss or injury to the shipper's property: the shipper will pay a lower rate if the carrier's liability is limited. “The arrangement releasing the carrier from a portion of its liability in exchange for a lower transportation rate is commonly referred to as a ‘released rate’ or a ‘released value rate.’” *Shippers National Freight Claim Council, Inc. v. ICC*, 712 F.2d 740, 742 (2d Cir. 1983), cert. denied, 467 U.S. 1251 (1984).

Every shipment transported by a motor common carrier is accompanied by a bill of lading, which is a contract between the carrier and the shipper. Pet. App. A8; see also *id.* at D1 (bill of lading form). The bill of lading typically cautions that “[w]here the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared

¹ A motor common carrier is “a person holding itself out to the general public to provide motor vehicle transportation for compensation.” 49 U.S.C. § 10102(14).

value of the property,” and provides a space for the shipper’s declaration of value. Pet. App. D1. The bill of lading also incorporates the terms of the tariff setting forth the rate charged by the carrier: “a shipper is deemed to be aware of, and agrees to be bound by, the tariff under which it is shipping.” *Id.* at A8.

This case concerns the facial validity of a provision commonly included in released rate tariffs—the “inadvertence clause.” Such a clause “applies the lowest released value specified in the tariff if the shipper fails to declare one of the higher released values [or the actual value] at the time of the shipment.” Pet. App. B4; see *id.* at A3-A4. Thus, “[i]f such a clause is present in a tariff, and a shipper fails to declare a value in the bill of lading, then the shipper is insured at the lowest rate permitted in the tariff. The shipper also generally pays for shipping at the lowest rate permitted in the tariff.” *Id.* at A4.

B. Proceedings Below

Petitioners—trade associations representing shippers that are customers of the general freight trucking industry—filed a complaint with the ICC seeking a determination that inadvertence clauses are *per se* unlawful under Sections 10730(b) and 11707 of the Interstate Commerce Act. The Commission dismissed the complaint, holding that “it is beyond question that inadvertence clauses are lawful under sections 11707 and [10730].” Pet. App. B6. The Commission rested its decision on a “virtually unbroken string of decisions upholding the legality of inadvertence clauses in tariffs.” *Id.* at B8.

“Without an inadvertence clause,” the ICC explained, “shippers would be able unilaterally to impose full liability on a carrier by choosing not to de-

clare a shipment's value under a released rate tariff. Such a result would defeat the carrier's right to know the extent of its potential liability for loss and be compensated in proportion to the risk assumed. An inadvertence clause preserves the rights of both the carrier and shipper under a released rates tariff. It in no way eliminates the shipper's right to declare a shipment's value for liability purposes." Pet. App. B6-B7 (footnote and citation omitted).

The Commission distinguished cases in which a shipper disputed the application of an inadvertence clause on grounds of misuse or concealment in the particular circumstances of a transaction, observing that petitioners' argument was that the "mere presence" of an inadvertence clause invalidated a tariff. The ICC limited its decision to rejecting this "facial attack" on the use of such clauses. Pet. App. B8.

The court of appeals affirmed the Commission's determination. Pet. App. A1-A12. It agreed with the Commission that "a bill of lading, taken together with the filed tariff containing an inadvertence clause, can constitute [the] written agreement between the carrier and shipper" required by Section 10730(b). Pet. App. A8. The court concluded that the ICC's dismissal of petitioners' complaint was "based on a permissible construction of the statute" and should therefore be upheld. *Id.* at A12, citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

ARGUMENT

Petitioners assert (Pet. 6-7) that the decision below works a dramatic change in the law, unsettling clear standards regarding the means by which a shipper accepts a released value rate. In fact, as both the ICC (Pet. App. B6) and the court of appeals (*id.* at A10-A11) recognized, inadvertence clauses have

been utilized in released value tariffs for many years. Moreover, petitioners' argument that a released value may never be based upon an inadvertence clause was rejected by the Second Circuit in a decision issued five years ago. See *Mechanical Technology Inc. v. Ryder Truck Lines, Inc.*, 776 F.2d 1085 (2d Cir. 1985). Petitioners' claimed conflict among the courts of appeals simply does not exist: no court has ever endorsed the *per se* rule espoused by petitioners.

The decisions below thus plow no new ground. Indeed, because the Commission's decision is limited to the facial validity of inadvertence clauses, and does not address the circumstances in which such clauses may in fact be invoked, the question presented in this case is exceedingly narrow. Because there is no conflict among the courts of appeals, and the decisions below are correct, the petition for a writ of certiorari should be denied.

I. INADVERTENCE CLAUSES ARE NOT *PER SE* UNLAWFUL

A motor common carrier may limit its liability for loss or injury to a shipper's property to a value established by "written declaration of the shipper" or by "written agreement between the carrier * * * and shipper." 49 U.S.C. § 10730(b)(1). This case involves a facial challenge to the inclusion of inadvertence clauses in carriers' tariffs; the issue before the ICC therefore was whether a bill of lading that incorporates a tariff containing an inadvertence clause may *ever* constitute a "written agreement between the carrier * * * and shipper" establishing a released value for the goods. The Commission correctly concluded that such a bill of lading could serve as the requisite written agreement, reserving the question whether enforcement of an inadvertence clause could

be unreasonable under the facts of a particular case. See Pet. App. B8.

The bill of lading indisputably is a written agreement between the carrier and shipper. That agreement incorporates the terms of the tariff—as to which the shipper is charged with knowledge²—and therefore includes the inadvertence clause, which by its terms establishes a released value for the goods. All of the elements of Section 10730(b)(1) are thus satisfied, and, if the released value “would be reasonable under the circumstances,” the statute would allow enforcement of the liability limitation. Pet. App. A8; accord, *Mechanical Technology Inc. v. Ryder Truck Lines, Inc.*, *supra*.³

The alternative interpretation of Section 10730(b) espoused by petitioners would allow a shipper to gain the benefit of the lower released rate for undamaged shipments and at the same time ensure the availability of the carrier's unlimited liability in the event the goods are lost or injured. As the ICC observed, “[t]he intent of released rates (*i.e.*, a lower rate in return for assumption of some liability) would be defeated if the shipper, simply by failing to state a value, obtained both a lower rate and full carrier liability.” Pet. App. B7 n.3. Enforcement of the inadvertence clause in appropriate circumstances serves to prevent this unfair result.⁴

² See, *e.g.*, *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 97-98 (1915). Indeed, federal law requires carriers to make their tariffs available to shippers. 49 U.S.C. § 10762; 49 C.F.R. §§ 1312.5-1312.6.

³ Contrary to petitioners' assertion (Pet. 12), nothing in Section 10730(b)(1) requires the written agreement to be separate from the bill of lading.

⁴ Petitioners' construction of the statute not only would be unfair, it would render the second clause of the statute mean-

Petitioners erroneously (Pet. 4, 10-11) equate the inadvertence clause with an automatic release of liability. The clause is not automatic. It is effective only because it is incorporated into the bill of lading—the contract between the shipper and the carrier—and because the shipper fails to declare a higher value on the bill of lading. *The shipper can avoid any limitation on the carrier's liability simply by declaring the full value of the goods.* And, of course, the shipper may challenge the reasonableness of the inadvertence clause under Section 10730(b)(1)'s "appropriate under the circumstances" standard or challenge the application of the clause under 49 U.S.C. §§ 10701 and 10708.

Finally, as the agency charged with enforcing the Interstate Commerce Act, the ICC is entitled to deference in its construction of the statute. The Commission's determination accords with the language of the statute and furthers Congress's goal of increasing the availability of released rates (see H.R. Rep. No. 1069, 96th Cong., 2d Sess. 25-26 (1980)), because carriers are more likely to offer such rates when they have greater certainty concerning their potential liability for loss or injury to goods. The administrative determination was properly upheld by the court of appeals. See *Drug & Toilet Preparation Traffic Conf. v. United States*, 797 F.2d 1054, 1058 (D.C. Cir.

ingless, because petitioners would always require a separate written declaration of the value of the goods in order to find a released value; a written agreement between shipper and carrier could never suffice. That approach is inconsistent with the settled principle that a provision should be interpreted so as to give effect to all of its provisions. See *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983).

1986) (discussing Commission's broad authority to authorize released value rates).⁵

II. THE DECISION BELOW ACCORDS WITH DECISIONS OF THE OTHER COURTS OF APPEALS ADDRESSING THE LAWFULNESS OF INADVERTENCE CLAUSES

Petitioners argue (Pet. 13-19) that the courts of appeals disagree with respect to the lawfulness of inadvertence clauses. But the cases cited by petitioners do not address the general lawfulness of inadvertence clauses. They concern the question not addressed by the Commission here—the reasonableness of enforcing an inadvertence clause in the circumstances of a particular case.

In *Anton v. Greyhound Van Lines, Inc.*, 591 F.2d 103 (1st Cir. 1978), for example, the court did not even discuss the facial validity of inadvertence clauses. It held that there was no agreement between the shipper and the carrier, noting that the shipper did not sign the bill of lading. 591 F.2d at 108. Indeed, because the bill of lading was not issued by the

⁵ Petitioners argue (Pet. 13-15) that the Commission's decision represents a change in position. But the Commission has approved tariffs containing inadvertence clauses (Pet. App. A10-A11, B6) and petitioners have not pointed to a single prior decision in which the Commission held that inadvertence clauses were *per se* invalid. All of the decisions that petitioners cite address the question whether holding the shipper to the released value specified in the inadvertence clause would be consistent with the "reasonable under the circumstances" standard set forth in Section 10730(b)(1). Finally, as the Commission observed (Pet. App. B7 n.3), to the extent some of the language in a 1979 opinion might be read to indicate blanket disapproval of inadvertence clauses, that language is inconsistent with the congressional policy favoring released rates embodied in the 1980 revision of the Interstate Commerce Act.

carrier, the court concluded that the requirements of the predecessor to Section 10730(b) could not be satisfied in that case. 591 F.2d at 108.

Similarly, in *Gordon H. Mooney, Ltd. v. Farrell Lines, Inc.*, 616 F.2d 619 (2d Cir.), cert. denied, 449 U.S. 875 (1980), the court declined to enforce the inadvertence clause because “neither the freight rate nor the valuation itself was written on the bill of lading.” 616 F.2d at 626 (emphasis added). The court thus concluded there was insufficient evidence that the shipper had agreed to the rate containing the inadvertence clause. Accord, *Mass v. Braswell Motor Freight Lines, Inc.*, 577 F.2d 665, 667 (9th Cir. 1978); *Caten v. Salt City Movers & Storage Co.*, 149 F.2d 428 (2d Cir. 1945) (shipper never received bill of lading and therefore could not be bound by terms of tariff). The Second Circuit made clear in its decisions in *Ruston Gas Turbines, Inc. v. Pan American World Airways*, 757 F.2d 29 (2d Cir. 1985), and *Mechanical Technology* that inadvertence clauses may be enforced in some situations—the precise conclusion reached by the Commission and the court below. —

Finally, the court in *Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129 (4th Cir. 1967), did not find that inadvertence clauses were illegal *per se*. To the contrary, the court, in remanding the matter for trial, noted that “[i]t is still possible that the jury might determine that there was an agreement in writing as to released value—without regard to the invalidity of the shipper’s signature.” 374 F.2d at 137; see also *id.* at 137 n.17, citing *Cray v. Pennsylvania Greyhound Lines, Inc.*, 110 A.2d 892, 896 (Pa. Super. Ct. 1955) (upholding an inadvertence clause).

In sum, none of the cases cited by petitioners support their contention that inadvertence clauses are *per se* unlawful.⁶

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1990

⁶ Petitioners also cite (Pet. 18) two district court cases. The court of appeals' decision in this case obviously deprives the decision in *Thomas Electronics, Inc. v. H.W. Taynton Co.*, 277 F. Supp. 639 (M.D. Pa. 1967), of any precedential effect. *Fine Foliage, Inc. v. Bowman Transportation, Inc.*, 698 F. Supp. 1566 (M.D. Fla. 1988), did not even concern an inadvertence clause. The court declined to give effect to a tariff provision denying all liability with respect to cargo requiring certain special handling, stating that such a provision did not satisfy the requirements of Section 10730(b)(1) because it did not constitute a declaration or agreement with respect to a released value. 698 F. Supp. at 1575.

